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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-770

REV. LEON HOWARD and BARNEY SCHOBY, individually and on behalf of all others similarly situated,
Petitioners,

versus

ADAMS COUNTY BOARD OF SUPERVISORS; SAMUEL L. CAUTHEN, A BOYD SOJOURNER, JAMES H. CARTER, IKE FOSTER, and E. A. REDD, Members of the Adams County Board of Supervisors,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No.

REV. LEON HOWARD and BARNEY SCHOBY, individually and on behalf of all others similarly situated,

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versus

ADAMS COUNTY BOARD OF SUPERVISORS; SAMUEL L. CAUTHEN, A BOYD SOJOURNER, JAMES H. CARTER, IKE FOSTER, and E. A. REDD, Members of the Adams County Board of Supervisors,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The plaintiffs below, petitioners here, Rev. Leon Howard and Barney Schoby, respectfully pray that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 2, 1973.

OPINIONS BELOW

This case involves the redistricting of the county supervisors' districts of Adams County, Mississippi, which serve as voting districts for the election of members of the county board of supervisors (the county governing board), justices of the peace, and constables. The opinion of the Fifth Circuit Court of Appeals (per Coleman, J.) is reported at 480 F.2d 978, and is reprinted in the attached Appendix. The opinion of the District Court is unreported, and also is included in the Appendix.

JURISDICTION

Plaintiffs, a black supervisor candidate and a black voter in Adams County displaced from a black majority district by redistricting, filed this action on May 5, 1971, against the all-white Adams County Board of Supervisors, and its individual members, who are charged under Mississippi law with drawing the boundaries of the county's five supervisors' districts, seeking (inter alia) declaratory and injunctive relief against racial gerrymandering of the district lines and (by amendment to the complaint) malapportionment of population among the districts. Jurisdiction was predicated on 28 U.S.C. §§ 1343, 2201 and 2202, and 42 U.S.C. §§ 1971(d) and 1973j(f) to protect rights secured by 42 U.S.C. § 1971, the Voting Rights Act of 1965, 42 U.S.C. § 1973 et seq., the Fourteenth and Fifteenth Amendments to the United States Constitution, and 42 U.S.C. § 1983.

The latest opinion and judgment of the Fifth Circuit were entered July 2, 1973, and a timely petition for rehearing en banc was denied on August 15, 1973. This petition is being filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1253(1).

QUESTIONS PRESENTED

Whether a county redistricting plan in a Mississippi county with an extensive prior history of racial voting discrimination and franchise dilution which (a) was drawn to retain incumbent white officeholders in their respective districts, and (b) unnecessarily fragments a preexisting district with a heavy black population concentration, thereby diluting black voting strength, violates Federal constitutional and statutory equal voting rights guarantees against racial discrimination in denying or abridging the right to vote.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment:

> *** No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Fifteenth Amendment:

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

42 U.S.C. § 1971(a)(1):

(a)(1) All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

42 U.S.C. § 1973:

No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

STATEMENT OF THE CASE

A. *Prior History of Voting Discrimination.* Prior to the passage of the Voting Rights Act of 1965, qualified black voters in Adams County, Mississippi — which is 47.9 percent black — were substantially disfranchised through the use of racially discriminatory voter registration tests.[1] After the Voting Rights Act abolished those tests, black voters quickly gained a voting majority in Supervisors' District 4 (see Appendix B, Map 1, *infra*), and in the 1967 county elections succeeded in electing a black constable and justice of the peace in District 4, but were denied the opportunity to elect a county supervisor of their choice when in 1966 the all-white Adams County Board of Supervisors switched from district to at-large supervisors elections dominated by the county-wide white majority. The switch to at-large elections, which diluted black Adams County voting strength in District 4, was struck down in 1969 as racially discriminatory,[2] but as a result of this prior history of voting discrimination and franchise dilution, no black since Reconstruction has been elected to the all-white Board of Supervisors in a county which is almost half black in population.

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[1]Howard v. Adams County Bd. of Superv'rs, Civil No. 1352 (S.D. Miss., Opinion of July 20, 1971, pp. 9-10), *aff'd*, 453 F.2d 455 (5th Cir. 1972), *cert. denied*, 407 U.S. 925 (1972); *see* United States v. Mississippi, 380 U.S. 128 (1965).

[2]Marsaw v. Patterson, Civil No. 1201W (S.D. Miss., filed July 14, 1967), *consolidated with* Fairley v. Patterson, 282 F. Supp. 164 (S.D. Miss. 1967), *rev'd sub nom.* Allen v. State Bd. of Elections, 393 U.S. 544 (1969); letter from Jerris Leonard, Asst. Att'y Gen., Civil Rights Div., U.S. Dept. of Justice to A. F. Summer, Miss. Att'y Gen., May 21, 1969 (objecting to Act of May 27, 1966, ch. 290, [1966] Gen. Laws Miss. 374, amending Miss. Code Ann. § 2870).

B. *Protection of Incumbent White Officeholders.* On November 24, 1971, ordered by the District Court to correct malapportionment of population among the five supervisors' districts,[3] the all-white Adams County Board of Supervisors adopted its second redistricting plan, at issue here. In preparing the Adams County redistricting plans, the Board's planning agent hired to draw the new boundary lines consciously and intentionally arranged the new boundaries so that each of the incumbent white supervisors would be retained in their respective districts and would not be pitted against each other for reelection.[4] Given the exclusion of blacks from exercise of the franchise prior to 1965, and given the switch to at-large voting in 1966 which prevented any black candidate from being elected to the Board of Supervisors in the 1967 elections, the effect was to freeze into office incumbent white officeholders who were elected when black voters of Adams County were being illegally deprived of the right to vote and of the right to cast an effective ballot.

C. *Dilution of Black Voting Strength.* Prior to redistricting, almost two-thirds (64 percent) of the black residents of Adams County lived in District 4, the county's northernmost district, which was 75.3 percent black and contained precisely twice the population of an equi-populous district. Within old District 4, black residents were most heavily concentrated in the 13 contiguous Census enumeration districts in the northern

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[3]Howard v. Adams County Bd. of Superv'rs, supra, involving the Board's first effort at redistricting.

[4]Trial Transcript, May 3, 1972, pp. 132-133 (Holland testimony).

part of Natchez, which area encompassed sufficient numbers to form an equi-populous district and is 77 percent black.

Instead of simply subdividing old District 4 into two new districts equal in population, both of which would have contained black majorities, the all-white Board of Supervisors approved a plan which carved up old District 4 among all five of the new districts, fragmenting areas of heavy black population concentration among the new districts, and thereby minimizing the number of black voters residing in each of the new districts (except one) and diluting black voting strength in Adams County. Almost half of the blacks formerly residing in black majority District 4 were fenced out of the only district in which they had an opportunity to elect officials of their choice and were dispersed among the four white majority districts in which their voting strength is effectively cancelled out by prevailing white majorities. The heaviest and most politically active black population concentration in the county — contained within the 13 contiguous Census enumeration districts in northern Natchez — with sufficient numbers to form a single equi-populous district by itself, was torn into separate pieces and fragmented among four of the five new districts, dispersing black voting strength in that area (see Appendix B, Map 2).

In approving the new plan, the Board rejected all traditional considerations thought to control redistricting. The fairly compact pre-existing district boundaries were abandoned. The new districts are extreme-

ly distorted and overly elongated, following invisible section lines, rather than natural ground features, in much of the county area, and splitting numerous enumeration districts established by the Census Bureau. Purporting to equalize county-maintained road mileage and rural land area (criteria which never prior to 1970 had been used in county redistricting, for which express state statutory authority is lacking, and which the President of the Board conceded were "not necessarily necessary" to efficient county government), the new boundaries zig-zag a tortuous route from a broad rural and predominantly white base and converge in spoke-like fashion on the heavy black population concentration in old District 4, and particularly in northern Natchez, attaching a heavily black segment to each of the new districts (see Appendix B, Map 3).

Given the history of racial bloc voting generally prevailing in Adams County, the view among blacks that the all-white Board does not adequately represent their interests, the provisions of state law (Miss. Code Ann. § 3194 (1956 Recomp.)) requiring a majority vote to secure nomination in the Democratic primary, which in most parts of Mississippi is tantamount to election, and the extensive prior history of voting discrimination and franchise dilution, the Board's plan maximizes white voting strength and minimizes black voting strength, deprives the politically active black voters in north Natchez of the opportunity to elect public officials of their choice, and provides Adams County black voters with less opportunity than white voters to participate in the political processes and to elect officials of their choice.

In opposition to the Board's plan, the plaintiffs presented an alternative, professional-prepared redistricting plan of their own based exclusively on the use of United States Census enumeration districts, whose boundaries are determined by the Census Bureau, as "building blocks" to establish new districts. While the Board's plan did substantially equalize population among the districts with a span of only 2.87 percentage points of variance between the most and least populous districts (480 F.2d at 979), plaintiffs' proposed alternative provided greater equality of population among the districts (span of only 1.79 percentage points of variance) (id.), with no district exceeding the norm by a variance of more than .99 percent. Plaintiffs' proposed alternative combined and subdivided pre-1970 districts, and substantially following prior district boundaries to minimize population shifts (and resulting confusion to voters) from old to new districts, generally established boundary lines along natural and physical ground features recognizable to the average voter, preserved all Census enumeration districts intact, provided for substantial geographic compactness among the districts, and did not fragment any population concentrations, white or black. Utilizing these objective planning criteria, plaintiffs' plan defined five supervisors' districts equal in population, two of which were majority black and three of which were majority white in population.

D. *Decisions Below.* The District Court expressed dissatisfaction with the dispersal of the black population concentration formerly included within old District 4 under the Board's plan, but approved it nonetheless:

> "The Court admits it is not happy with defendants' 1971 proposed district boundaries within the northern part of the City that increase the negro majority in Beat 4, and lessen their population percentage in Beat 3, but under the time restrictions imposed on this Court, it has no recourse but to approve it." (App. 27a.)

The Court of Appeals affirmed, without discussion of the consequences of protecting incumbent white officeholders in their respective districts under the circumstances of this case, and without discussion of the traditional anti-gerrymandering standards of compactness, adherence to preexisting and natural district boundaries, and the like.

REASONS FOR GRANTING THE WRIT

The Decision Below Raises Significant And Recurring Questions Concerning Constitutional and Federal Statutory Prohibitions Against Racial Gerrymandering.

Southern political subdivisions subject to the provisions of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, having generally been barred by the decisions of this Court, e.g., *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 569 (1969), and by subsequent Attorney General objections from switching to at-large elections as a device for diluting minority voting strength, increasingly are turning to racial gerrymandering of election

district boundaries to achieve the same end.[5] This Court has noted findings that in the South since the passage of the Voting Rights Act "gerrymandering and boundary changes had become prime weapons for discriminating against Negro voters," *Perkins* v. *Matthews*, 400 U.S. 379, 389 (1971). Having been preoccupied with the application of rules of arithmetic population equality in the large number of redistricting and reapportionment cases coming to this Court since *Baker* v. *Carr*, 369 U.S. 186 (1962), this Court has not since the New York case of *Wright* v. *Rockefeller*, 376 U.S. 52 (1964), addressed itself to the application of Federal constitutional and statutory equal voting rights requirements to redistricting practices and racial gerrymandering, R. Dixon, DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 458 ff. (1968). The time has come for this Court to establish definitive guidelines in this area, particularly since this Court's ruling that "[a redistricting] decree of the United States District Court is not within the reach of Section 5 of the Voting Rights Act," *Connor* v. *Johnson*, 402 U.S. 690, 691 (1971).

The issues presented in this case therefore present substantial questions which should be resolved by this Court:

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[5]For recent discussions of Southern racial gerrymandering since the passage of the Voting Rights Act, *see* S. Halpin and R. Engstrom, *Racial Gerrymandering and Southern State Legislative Redistricting: Attorney General Determinations Under the Voting Rights Act*, 22 J. of Public L. 37 (1973); F. Parker, *County Redistricting in Mississippi: Case Studies in Racial Gerrymandering*, 44 Miss. L.J. 391 (1973); Washington Research Project, THE SHAMEFUL BLIGHT: THE SURVIVAL OF RACIAL DISCRIMINATION IN VOTING IN THE SOUTH, esp. ch. 5, *Dilution of the Vote* (1972).

(1) To what extent is the protection of incumbent white officeholders a permissible factor in redistricting after an immediate and extensive prior history of voting discrimination and franchise dilution? While political considerations and the concerns for reelection of incumbent officeholders are not completely impermissible redistricting criteria in racially neutral circumstances, *Gaffney* v. *Cummings*, ____ U.S. ____, 37 L.Ed.2d 298, 312 (1973), they are "not wholly exempt from judicial scrutiny under the Fourteenth Amendment," particularly "if racial ... groups have been fenced out of the political process and their voting strength invidiously minimized." Id.

Although urged below, the Fifth Circuit in its opinion completely failed to mention or discuss the constitutional significance of protecting white incumbent officeholders under the circumstances of this case. A redistricting plan drawn with the intention of preserving in office white incumbents elected as a result of decades of racial voting discrimination "freezes into office ... persons who were elected when Negroes were being illegally deprived of the right to vote. Under such circumstances, to freeze elective officials into office is, in effect, to freeze Negroes out of the electorate. That is forbidden by the Fifteenth Amendment." *Sellers* v. *Trussell*, 253 F.Supp. 915, 917 (M.D. Ala. 1966) (three-judge court) (invalidating statute extending terms of office of white incumbents). Cf. *Bussie* v. *Governor of Louisiana*, 333 F.Supp. 452, 456 (E.D. La. 1971), *modified and aff'd*, 457 F.2d 796 (5th Cir. 1971), *vacated and remanded sub nom. Taylor* v. *McKeithen*, 407 U.S. 191 (1972).

(2) To what extent are the teachings of *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971), barring color-conscious solutions to redistricting problems, applicable to a redistricting plan which operates to minimize and dilute black voting strength after an immediate and extensive prior history of voting discrimination and franchise dilution? Although this Court repeatedly has warned that redistricting schemes are unconstitutional when they "designedly or otherwise ... operate to minimize or cancel out the voting strength of racial or political elements of the voting population," *White* v. *Regester*, ___ U.S. ___, 37 L.Ed.2d 314, 324 (1973); *Whitcomb* v. *Chavis*, supra, at 143; *Burns* v. *Richardson*, 384 U.S. 73, 88 (1966); *Fortson* v. *Dorsey*, 379 U.S. 433, 439 (1965), the District Court and Court of Appeals approved the dispersal of black voting strength achieved by the Board's plan and rejected plaintiffs' proposed alternative,[6] basing their result on a prior Fifth Circuit decision citing *Whitcomb* and holding: "Inevitably, people of different races, national origins, and contrasting tenets will be shifted under reapportionment plans to districts in which they may no longer be in the clear majority." 453 F.2d at 459, App. 13a-14a.

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[6]The primary basis for the rejection of plaintiffs' proposed alternative plan appears in the following passage from the District Court decision quoting a prior Fifth Circuit decision:

> "Further, we reject the plaintiffs' notion that they are constitutionally entitled to have old District Four divided into two predominantly black electoral districts simply because they command a population concentration of sufficient size and contiguity to constitute two equally apportioned districts." App. 24a.

The Fifth Circuit, normally keen in protecting voting rights from racial discrimination, has experienced difficulty articulating and applying strict anti-gerrymandering standards. The Fifth Circuit in the instant decision utterly failed to take note of, and the standards employed by the Court of Appeals fundamentally conflict with, the suggestions provided by this Court in another recent Fifth Circuit redistricting case with similar facts, *Taylor* v. *McKeithen*, 407 U.S. 191 (1972). In *Taylor* the District Court held constitutionally unacceptable a Louisiana legislative redistricting providing for one black majority district (as does the Board's plan here) because it would "operate to diversify the Negro voting population throughout the four districts and thus significantly dilute their vote" and would practically eliminate "the possibility of a Negro being elected from any of the four districts," while the special master's plan adopted by the District Court (like the plaintiffs' proposed alternative) would at least give blacks "a fair chance in two out of the four districts ..." The District Court also held that the court-approved special master's plan sought "to protect the rights of people while the primary purpose of the Senators' plan appears to be the protection of incumbent office holders" 407 U.S. at 193. This Court implicitly gave its approval to the standards applied by the District Court in *Taylor* when it set aside the Fifth Circuit judgment substituting the proposed alternative rejected by the District Court for the court-approved plan, and sent the case back to the Fifth Circuit for a reasoned justification of its action in light of the District Court's findings.

In reaching this result, the Court in *Taylor* said that because of proof of past discrimination in voting the outcome was not controlled by the views expressed by the Court in *Whitcomb:*

> "The important difference, however, is that in Whitcomb it was conceded that the State's preference for multi-member districts was not rooted in racial discrimination ... Here, however, there has been no such concession and, indeed, the District Court found a long 'history' of bias and franchise dilution in the State's traditional drawing of district lines." 407 U.S. at 194, n. 3.

(3) What objective and feasible standards should be adopted for judicial examination of claims of racial gerrymandering? In sharp contrast to the approval given the fragmentation of areas of black population concentration and dilution of black voting strength here, the Attorney General in his Section 5 objections and several courts have held that the unnecessary dispersal of minority voting strength in redistricting plans violates constitutional guarantees. See, e.g., *Bussie* v. *Governor of Louisiana,* supra; *Klahr* v. *Williams,* 339 F.Supp. 922, 927 (D. Ariz. 1972); cf. *Troxler* v. *St. John the Baptist Parish Police Jury,* 331 F.Supp. 222 (E.D. La. 1971). Gerrymandering questions especially are raised, but inexplicably not discussed by the Fifth Circuit, where as here the minority dilution is accomplished by a plan which fails to provide the greatest

equality of population among the districts, which abandons preexisting political subdivision, Census district, and natural boundary lines, which results in districts which are not compact or regular in shape, and which cannot be justified as necessary to any compelling governmental need. See, *Reynolds* v. *Sims*, 377 U.S. 533, 562, 578-79 (1964); J. Edwards, *The Gerrymander and "One Man, One Vote,"* 46 N.Y.U. L.Rev. 879 (1971).

The inferable purpose and obvious effect of the Board's redistricting plan is to perpetuate Adams County's immediate prior history of abridgement of the voting rights of blacks, and as such falls squarely within the prohibitions of *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); *Smith* v. *Paris*, 257 F.Supp. 901 (M.D. Ala. 1966), *modif'd and aff'd*, 386 F.2d 979 (5th Cir. 1967); and *Sims* v. *Baggett*, 247 F.Supp. 96 (M.D. Ala. 1965) (three-judge court).

If the rationale of the reapportionment decisions is to insure that "each and every citizen has an inalienable right to full and effective participation in the political processes," *Reynolds* v. *Sims*, 377 U.S. 533, 565 (1964), this case clearly demonstrates that the salutary gains achieved by the reapportionment revolution may well be obliterated if, in the absence of strict anti-gerrymandering standards, the redistricting requirement is permitted to serve as an excuse for racial gerrymandering.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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APPENDIX A: COURT DECISIONS

In the United States Court of Appeals
For the Fifth Circuit

No. 72-2596

Reverend Leon Howard, et al,
Plaintiffs-Appellants-
Cross Appellees,

versus

Adams County Board of Supervisors, et al,
Defendants-Appellees-
Cross Appellants.

Appeals from the United States District Court for the Southern District of Mississippi

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ON PETITIONS FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion July 2, 1973, 5 Cir., 1973, ____ F.2d ____).

(August 15, 1973)

Before WISDOM, GEWIN and COLEMAN, Circuit Judges.

PER CURIAM: The Petitions for Rehearing are DENIED and no member of this panel nor Judge in

regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

CORRECTED

In the United States Court of Appeals
For the Fifth Circuit

No. 72-2596

Reverend Leon Howard, et al,
Plaintiffs-Appellants-
Cross Appellees,

versus

Adams County Board of Supervisors, et al,
Defendants-Appellees-
Cross Appellants.

Appeals from the United States District Court for the Southern District of Mississippi

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(July 2, 1973)

Before WISDOM, GEWIN and COLEMAN, Circuit Judges.

COLEMAN, Circuit Judge: One wing of this appeal is an attempted re-run of the decision of this Court in *Howard v. Adams County Board of Supervisors*, 5 Cir., 1972, 453 F.2d 455, cert. denied 407 U.S. 925. That case dealt in depth with the contention there raised, and now sought to be raised anew, that the districts for the election of county supervisors in Adams County, Mississippi had been racially gerrymanded and had resulted in an impermissible dilution of the black vote for the election of supervisors in that County.

The present controversy centers upon a court ordered and court approved redistricting of Adams County dated November 26, 1971. Appellants contend that the November 26, 1971 plan (1) resulted in malapportionment of the districts and (2) dilutes the black vote for the election of supervisors. We find no merit in the first contention and the second was settled by our prior decision, *Howard v. Adams County Board of Supervisors, supra.* Accordingly, the judgment of the District Court is affirmed. Defendants-appellees have cross-appealed the order for new elections in the reconstituted districts. We also affirm the judgment in this respect.

The division of Adams County into five districts of substantially equal population for the election of county supervisors is beset by special obstacles. On its western side, the County borders the Mississippi river. Half the population of the County lives in the

City of Natchez. An extensive swamp in the southwestern section of the County, a National Forest in the eastern section, and other large uninhabited areas in the County, raise additional difficulties.

Divided absolutely equally the population of each district would be 7458. It is immediately apparent, therefore, that while county supervisors have no jurisdiction over the construction and maintenance of city streets and do have exclusive jurisdiction of such activities in regard to county roads, a five way split in county population dictated that in some manner most, if not all, districts would have to encompass some territory within the City. In the plan approved by the District Court and presently under review, the districts were drawn to fan in, out and from the City, like the spokes of a wheel. Some part of the City is included in each of the five supervisor's districts. While this approach, from the standpoint of geographical area and roads is a long way from ideal, it did divide the population as follows:

District	*Total*	*Variance*	*Percentage of Variance*
1	7331	— 127	— 1.70%
2	7545	+ 87	+ 1.17%
3	7506	+ 48	+ 0.64%
4	7465	+ 7	+ 0.09%
5	7446	— 12	— 0.16%

This means, of course, that the average deviation among the districts is less than 1% of the norm, the greatest overage being 1.17% in District 2 and the max-

imum deficiency being 1.70% in District 1. Out of a total population of 37,290 people, the greatest deviation (between Districts 1 and 2) was 214.

On Friday before the case was scheduled to go to trial on the following Monday, the plaintiffs filed their proposed plan of county-district reapportionment. This plan would have divided the population of the five districts as follows:

District	*Population*	*Variance from Norm*
1	7415	— 0.58%
2	7399	— 0.80%
3	7440	— 0.25%
4	7506	+ 0.63%
5	7533	+ 0.99%

The variations in two of the districts were greater than those appearing in the Board plan, but less by an average of 0.60% than that proposed for the other three districts.

The plaintiffs' plan produced an overall population spread between the most populated and the least populated districts of 134 persons. This compared to a maximum spread of 214, or a difference of 0.20%, in the Board plan.

It is now argued that the trial court should have accepted this plan rather than the one submitted by the Board. It is said that this plan was made strictly from official Census units, but the population accuracy

of the Board plan had also been verified by the Census Bureau.

It is said that the proposed plan more nearly conformed to pre-reapportionment district lines. It must be remembered, however, that prior to reapportionment, according to the 1970 Census, District 1 had 13,590 people, District 4 had 15,074, District 5 had 6,064, District 3 had 1,492, and District 2 had 1,073. Districts 1 and 4 had to be reduced by about 50% while Districts 2, 3, and 5 required a radical increase, almost 700% in District 2 and nearly 600% in District 3. Therefore, any idea of substantially conforming to former district lines would border on the hopeless.

Under the plan proposed by the plaintiffs, the black population in District 3 would have been 77.07% of the district while the black population of District 4 would have been 70.44% of the district. This would have been accomplished by the division of old (pre-1970) District 4 into two predominantly black districts, the goal contended for and rejected in *Howard v. Adams County Board of Supervisors, supra.*

Moreover, District 3 would have been entirely contained within the corporate limits of the City of Natchez and would have destroyed the spokelike configuration of each of the districts, which combined rural with urban population. Under the plaintiffs' plan, the supervisor for District 3 would have had no county roads to supervise or maintain, one of the more important functions imposed by law upon members of the Boards of Supervisors.

We cannot hold that the District Court, sitting as a chancellor, abused its discretion in exercising a choice between two alternatives so clearly matched as were the plans here in issue. A net difference of 2/10 of 1% in the population ratios of the two plans is simply not enough for us to substitute our opinion for that of the trial judge. Moreover, there were important considerations here such as existed in *Abate v. Mundt*, 1971, 403 U.S. 182, 91 S.Ct. 1904, 29 L.Ed.2d 399. Additionally, we are of the opinion that the Court approved plan adheres to the principles enunciated in *Reynolds v. Sims*, 1964, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506.

Further pursuing the subject of dilution of the racial voting power, neither the plaintiffs nor the defendants have provided us with data as to voting strength in the various proposed districts now under review. They do give the population figures:

District	*Black*	*White*
1	45.6%	54.4%
2	40.7%	59.3%
3	42.3%	57.7%
4	77.6%	22.4%
5	34.1%	65.9%

It is to be noted that in District 4 blacks number 77.6% of the population; under the plan considered as to racial dilution in *Howard v. Adams County Board of Supervisors, supra*, blacks amounted to 67%. This was the only district in *Howard* which had a majority of blacks and thus able to elect a supervisor if voters

voted solely upon racial considerations. It still has that majority, increased by 10% as reflected by the 1970 Census, rather than 1960. As did the *Howard* panel [Judges Gewin, Goldberg, and Dyer] we hold that the trial court was under no duty wholly from municipal territory to erect an additional "black district", in which the supervisor would be shorn of some of his primary official functions and to that extent would be reduced to a mere figurehead. There is nothing new in the racial dilution arguments contained in this appeal. We are consequently bound by and adhere to the prior panel decision on that subject.

The defendants-appellants have cross appealed from the order requiring that an election be held to choose supervisors from the newly constituted districts. Such an election has already been ordered by a prior panel of this Court. The present panel is no more at liberty to set aside that order than to reverse the decision of the prior panel on the racial dilution issue, nothing new nor material being raised.

AFFIRMED on direct and cross appeals and remanded for further proceedings consistently herewith.

OPINION OF THE COURT

United States District Court
Southern District of Mississippi
Western Division

Reverend Leon Howard, et al,
Plaintiffs,

versus Civil Action No. 1352

Adams County Board of Supervisors, et al,
Defendants.

In June 1971, after a three-judge court was dissolved, it having been determined by that Court that the Attorney General of the United States of America, under and by virtue of Section 5 of the Voting Rights Act of 1964, had voiced no objection to the proposed plan to redistrict the supervisory districts of Adams County, Mississippi, presented by that board of supervisors, a trial on the merits of the plan was had, U.S. District Judge Walter L. Nixon, Jr., presiding. Following the trial Judge Nixon issued his memorandum opinion, dated July 20, 1971, finding that the plan adopted by the Adams County board of supervisors on November 2, 1970, based on the available 1960 Census data, complied with the one-man, one-vote requirement of the equal protection clause of the Fourteenth Amendment, and that the new supervisory district boundaries, as proposed in the plan, were in no wise racially motivated or gerrymanded to dilute the voting strength of a heavy concentration of the black population of

Adams County located within the environs of the City of Natchez and to the north thereof. At the time of the formulation of the plan by Comprehensive Planners, Inc., an agency employed by the board to draw up a redistricting plan, herein called CPI, the only population figures available were those from the 1960 Census. At the time of the trial, 1970 Census figures were available and it became apparent that the population count, by districts, in Adams County had changed to such a degree as to be constitutionally challengeable. While holding the plan constitutional based on 1960 Census figures, and allowing the November 1970 general elections to proceed on schedule, Judge Nixon said: "Nevertheless, the defendants herein shall on or before December 1, 1971, present a constitutionally acceptable revised or modified redistricting plan, based on the 1970 Census figures, which complies with the one-man, one-vote requirement of the Equal Portection Clause of the Fourteenth Amendment."

Pending an appeal of this decision, the Fifth Circuit Court of Appeals, on July 29, 1971, denied plaintiffs' motion for an injunction pending appeal and their alternative motion for an expedited hearing. The Appellate Court in its mandate further provided:

> "... that upon the filing of the redistricting plan for the supervisors' districts on or before December 1, 1971, as directed by the district court in its opinion of July 20, 1971, the district court shall expeditiously proceed to hear, determine and pass upon the merits of such a plan, and if any plan presented is not a meri-

torious plan, then the district court, with the best information available, shall devise one.

"IT IS FURTHER ORDERED that upon the approval of a legally sufficient plan by the district court, and, in any event, not later than May 16, 1972, the district court shall order that a final election be held under the laws of the State of Mississippi in the five (5) respective districts (beats) of Adams County for the selection of a board of supervisors in compliance with the one-man, one-vote mandate of the United States Constitution. Those supervisors elected pursuant to the terms of this order shall assume and hold the offices to which they are elected within thirty (30) days after such election.

"IT IS FURTHER ORDERED that the district court shall retain jurisdiction of this cause subject only to the provisions hereof.

"We further note, however, that in the absence of the record we do not pass upon appellants' contention that the redistricting of Adams County 'was racially motivated and enacted for the purpose and effect of diluting the voting strength of black voters of Adams County, particularly those residing in old District 4, and of preventing the election of black candidates for office in Adams County.' This contention will be considered when the case is finally submitted to this court for hearing on the merits."

On the merits the Fifth Circuit Court of Appeals affirmed in all respects the decision of the lower court. See *Reverend Leon Howard, et al v. Adams County Board of Supervisors*, et al, No. 71-2361, dated January 6, 1972. The Appellate Court recognized that the focus of the appeal was plaintiffs' claim that the defendants plan was constitutionally impermissible as a racially motivated gerrymander, operating to dilute the voting strength of the blacks of Adams County. The Appellate Court, in dealing with this issue, said:

> "As we view the constitutional requirements in this area, to establish the existence of a constitutionally impermissible redistricting plan, in the absence of malapportionment, plaintiffs must maintain the burden of proving (1) a racially motivated gerrymander, or a plan drawn along racial lines, Wright v. Rockefeller, 1964, 376 U.S. 52; Gomillion v. Lightfoot, 1960, 364 U. S. 339; Sims v. Baggett, M.D. Ala. 1965, 247 F. Supp. 96, or (2) that ' ... designedly or otherwise, a(n) ... apportionment scheme, under the circumstances of a particular case would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.' Burns v. Richardson, 1966, 384 U. S. 73, 88. See Whitcomb v. Chavis, 1971, 403 U.S. 124, 143-144, 149.
>
> "First, a careful consideration of the record leaves us in complete agreement with the finding of the district court that plaintiffs failed to sustain their burden of proving that the CPI

plan was the product of a racial motivation or purpose. See Wright v. Rockefeller, supra, 376 U.S. at 56. The record is bare of such evidence. The district court was correct in holding that CPI did not consider, nor were they instructed to consider, the racial makeup of the districts to be drawn.

"These considerations lead us to approve the finding of the district court that plaintiffs failed to sustain their burden of showing that the new plan is a constitutionally impermissible dilution, minimization, or cancellation of the voting strength of the black citizens of Adams County. See Whitcomb v. Chavis, supra, 403 U. S. at 144. On the contrary, we find that the plan passes constitutional muster. Further, we reject the plaintiffs' notion that they are constitutionally entitled to have old District Four divided into two predominantly black electoral districts simply because they command a population concentration of sufficient size and contiguity to constitute two equally apportioned districts.

"For the reasons already explicated, we reject the separate claim by Howard, Schoby, and the class they represent that they have suffered a separate unconstitutional dilution by denial of the right to vote in a district where they constituted a majority class prior to redistricting. Inevitably, people of different races, national origins, and contrasting tenets will

> be shifted under reapportionment plans to districts in which they may no longer be in the clear majority. But when, as here, no racial motivation spawns a change of the voting area of those complaining, and the redistricting plan does not unconstitutionally dilute the voting strength of the complaining minority, there is no abridgement of voting rights."

Shortly after the beginning of the current calendar year, this action, in a division of the case load pending in this district, was assigned to this Court, and was set on a pre-trial calendar for January 24, 1972. At that time, although time for discovery remained open until February 9, 1972, the Court was advised that the board's revised plan had been filed on November 26, 1971 and that there were no objections pending. The case was then set for trial on May 2, 1972. At the request of defendants for a pre-trial on that date, the Court granted the request, learning for the first time that plaintiffs, although still not having made any written objections to defendants' plan or proposals of their own, intended to make objections and file a proposed plan. Defendants strenuously urged against the propriety of this Court's consideration of objections or a plan so untimely proposed. The Court, in the interest of hearing as much evidence as possible within the time limits imposed, reserved ruling on the exclusion of the plaintiffs' objections and proposed plan, and the cause proceeded to trial the next day.

As stated above, defendants' revised plan was filed on November 26, 1971. Attached to it is the board's

petition for the Court's approval, and a copy of the order of the board of supervisors of November 15, 1971, whereby the board has adopted the proposed revised supervisor district lines, and to which is attached a metes and bounds description of each of the four proposed precinct boundaries that will exist in each revised supervisor's district. The plan contains narrative and statistical data and maps showing the proposed boundary lines both in the county and the City of Natchez.

Mr. Hoyt T. Holland, Jr., vice-president of CPI, who testified in the trial before Judge Nixon, and whose qualifications were admitted into evidence, as here, undertook on the board's behalf to explain the modifications proposed. His primary objective, using population data from the 1970 Census, was to relocate the supervisory or beat lines to achieve maximum equality, population-wise, of each beat. Secondary factors, at the request of the board, were to equalize road mileage and square miles in each beat as much as possible. He, and the employees of his firm, used the counts of population appearing in enumerator district printouts compiled by the 1970 Census. There are 41 enumerator districts in Adams County. He split some of these enumerator districts, where necessary, using figures obtained from the Census in the split areas based on a head count rather than housing figures.

The submitted plan results in the following table:

District	*Population*	*Deviation From Ideal*	*Percent of Deviation*
1	7,331	—127	—1.70%
2	7,545	+ 87	+1.17%
3	7,506	+ 48	+ .64%
4	7,465	+ 7	+ .09%
5	7,446	— 12	— .16%
	37,293		

The norm or ideal population for each beat is 7,458 persons. The above table reveals the widest variation being between Beats 1 and 2, Beat 1 having 127 persons below the norm, and Beat 2 having 87 over the norm, for a maximum variation of 2.87%. According to Holland this variation amounts to 214 people out of 37,293, or less than .6%.

It is worthy to note that from 1960 to 1970, using Census figures, the total population in Adams County has dropped from a total of 39,698 to 37,293, as reflected in Judge Nixon's decision. Where CPI used the 1960 Census in working out the beat lines to acceptable figures, these same lines, using 1970 Census figures caused a variation in population of figures of a -12% in Beat 1 to a + 10% in Beat 2. It is readily seen that the proposed revised lines accomplish their purpose in reducing the variation to an acceptable one and in keeping with the recognized desire on the part of the supervisors to equalize road mileage and area as much as possible. The Fifth Circuit, in the circumstances

of this case, recognized these desires as practical factors in a re-districting plan where population is to be equalized on a local government level. Other cases have also recognized circumstances which justify departure from a strict mathematical equalization. See *Abate v. Mundt*, ____ U.S. ____, June 7, 1971; *Avery v. Midland*, 390 U. S. 474; *Dusche v. Davis*, 387 U.S. 112; and *Sailors v. Kent Board of Education*, 387 U.S. 105.

The Appellate Court likewise put to rest plaintiffs' contention that the configuration of the supervisory districts, extending spoke-line out from the City of Natchez was an intent to gerrymander. As the Court sees it in the present action, the sole issue is whether the supervisory lines as now contemplated, having been revised to meet the constitutional requirements of *Reynolds v. Sims*, may be said to have been re-drawn in such a fashion as to amount to a racial gerrymander.

The racial composition of the supervisor's districts under the November 2, 1970, plan, using the 1960 Census data, as reported in Judge Nixon's decision were:

District	*White*	*Percent*	*Non-White*	*Percent*	*Total*
1	4442	56.2	3459	43.8	7901
2	4708	60	3139	40	7847
3	4267	52.7	3823	47.3	8090
4	2606	33.2	5225	66.8	7861
5	4895	61.2	3104	38.8	7999
	20,918	52.7	18,780	47.3	39,698

A similar tabulation, using 1970 Census data, is:

District	*White*	*Percent*	*Non-White*	*Percent*	*Total*
1	3586	54.6	2976	45.4	6562
2	4466	60.2	2955	39.8	7421
3	4183	50.9	4031	49.1	8214
4	2288	33.2	4602	66.8	6890
5	4843	59.0	3363	41.0	8206
	19,366	51.9	17,927	48.1	37,293

As noted by Judge Nixon and the Appellate Court the board, at no time during the compilation of the 1970 plan, requested CPI to furnish racial figures. This same is true of the revised 1971 plan. As reflected in defendants' answers to interrogatories, the first computation of racial breakdown of population within the revised districts was begun by CPI following plaintiffs' interrogatories. These computations were completed more than a month after the defendant board adopted the 1971 revisions and filed it with the Court. Based on 1970 Census data, they are:

	POPULATION			*PERCENT*	
District	*White*	*Non-White*	*Total*	*White*	*Non-White*
1	3990	4451	7331	54.4	45.6
2	4471	3074	7545	59.3	40.7
3	4328	3178	7506	57.7	42.3
4	1670	5795	7465	22.4	77.6
5	4907	2539	7446	65.9	34.1
	19,366	17,927	37,293	51.9	48.1

A comparison of the last two tables shows that the racial ratio has remained fairly constant in Beats 1 and 2. In Beats 3 and 5, the white ratio increases while the black decreases. In Beat 4, where non-whites have a majority, the non-white ratio increases with a commensurate decrease in white population. Increasing the non-white population in Beat 4, where non-whites already had a majority and decreasing non-white population in Beat 3, where the ratio was nearly equal under the 1970 plan, is the core of plaintiffs' objections. Oddly, the racial composition of Beat 4 in the 1970 plan under both 1960 and 1970 Census data was the same. Although courts have relied often on statistics for conclusions, it remains to determine whether the above statistics are proof themselves of a racial gerrymander here.

The 1970 plan, by means of a spoke-line configuration, the hub being the City of Natchez, was based on having both rural and city representation in each beat. Under the 1970 plan the population was classified as 36.9% rural and 63.1% urban. As stated by the Appellate Court with reference to the 1970 plan:

> "Equality of population in electoral districts was a primary goal of the revision. Another objective, however, was the equalization of the responsibilities of each Supervisor in exercising their traditional function of highway and bridge maintenance. Thus, the Board instructed CPI not only to equate, as best it could, the population of the districts, but also the mileage of roads for county maintenance, and the

> square mile area of each district. With its land area largely rural, and its population concentrated in one urban area, the realization of these legitimate planning objectives dictated a plan which would consolidate urban and rural areas into each district. As the new plan was developed, therefore, each district converged in spoke-like fashion from a broad rural base into the City of Natchez. This dissection of the population concentration of the county resulted in an equal allocation of the population of Natchez among the new districts. Under the population figures available to CPI in 1970, prior to the publication of the 1970 Census, the result was a plan in which substantial equality of population was reached in districts that reflected cross sections of urban and rural land areas."

Thus, the Appellate Court gave its approval to a plan having each district representative of rural and urban interests. By retaining this configuration in the 1971 plan that purpose was maintained.

Holland said that his first problem in formulating the revised plan was in equalizing the disproportionate population counts between Beats 1 and 2, those which were shown to have the greatest variance.

Accordingly, the boundary line between Beats 1 and 2 was altered. Otherwise, he stated that he used the same rural boundaries, that is, the beat lines outside the city limits, in the revised plan as those in the 1970

plan. The legal description of these boundaries had been established by the board in the 1970 plan, and, except for a simple alteration in the location of the line between Beats 1 and 2, south of the city, making no changes in the remainder of the rural boundaries is a matter of practicality. In order to keep the rural boundaries constant, it was necessary to make considerable changes in the city in tracking the Census enumerator districts, necessarily more dense and compact than rural enumerator districts, and without disrupting existing voting precincts.

In the 1970 plan, Holland said he came within a 5% variation of his goal for equating road mileage among the five districts, using only the mileage of county maintained roads. Neither city, state or federal highways were included. He concedes there is a greater disparity in the 1971 plan, primarily because of the change in the boundary between Beats 1 and 2, where mileage had to be sacrificed for population equality. Had it not been for the time element involved, he stated that he could reduce the present variance of 2.87% in population figures to a lesser figure by a further shift of the boundary between Beats 1 and 2 inside the city.

Turning to the plan offered by plaintiffs, the Court condemns the practice by plaintiffs' counsel of waiting until the day of the trial to present their plan to the Court and opposing counsel as was done in this and another redistricting case heard immediately following this action, particularly in view of the common deadline imposed on this Court for a decision in both

cases. Counsel is well aware of this Court's pre-trial requisites of a mutual exchange between counsel for both sides of the issues involved and an exchange of exhibits, among other things. Here plaintiffs had before them the defendants' plan since November 26, 1971. Concededly it takes time for plaintiffs to prepare a proper redistricting plan in the detail necessary for its full implementation. But the defendant board and the Court should have had more opportunity for examination of plaintiffs' plan as to its merits and its disadvantages than one day before trial, and on which day this Court was engaged in hearing another case with a similar problem.

Plaintiffs' plan was prepared by Thomas Gordan Seabrook of Thomas Seabrook & Associates, Memphis, Tennessee. He is a professional in urban planning. The Court recognizes his expertise in his field. However, he admitted that a plan for Adams County was his first venture in county redistricting. Seabrook stated that his criteria was, first, equality of population, and, second, maintenance of existing supervisory districts. As to the latter, he was referring to pre-1970 boundaries. His plan uses whole Census enumerator districts without separating or splitting any of them. It is noted here that Seabrook, in compiling his narrative descriptions, used the outer perimeters of the government's enumerator district descriptions. On cross examination, with reference to the written descriptions of the beats he admitted errors in tracking from the descriptions of the enumerator districts. Although some errors were reportedly corrected during a recess in the hearing, the Court has no way of verifying the correctness

of the remainder of the descriptions. He accepts Census data as free from any taint of inaccuracy, because these counts are made by objective persons. The Court notes that CPI used the same data. The narrative part of this plan as to population equalization is as follows:

District	*Total Population*	*Percent Variance*
1	7415	—.58%
2	7399	—.80%
3	7440	—.25%
4	7506	+.63%
5	7533	+.99%
	37,293 Total Spread	1.79%

Except for re-numbering the beats, plaintiffs' plan essentially leaves the boundary lines of each district as they were prior to 1970 with one major change — a new Beat 3 is carved out of old Beat 4, the boundaries of the proposed Beat 3 lying totally within the City of Natchez. The total variant in population would be slightly less than that of defendants, a difference amounting to 80 people or .2 of 1%. The obvious effect of this plan is to give non-whites a majority in the proposed Beats 3 and 5. All beats retain a fairly consistent ratio of urban population to rural, except Beat 3 which is all urban. This plan, according to Seabrook would call for a shifting from one beat to another of 16,089 people, or 43% of the total population, including over 11,000 within the city itself. These comparisons were based on historic or pre-1970 beat lines and not with the changes already brought about in the 1970 board plans, and the Court gives no special signifi-

cance one way or another to any of his comparisons with pre-1970 circumstances, except as to the difficulty of the board in giving awareness to the public of major changes in beat lines within two successive years.

Seabrook professed to be ignorant of the court decisions pertaining to the 1970 board plan, saying that his sole concern was equalization, and that his plan has less variance than defendants' revised plan. As to why he located all of Beat 3 within the City of Natchez, he saw no reason why a beat should have both urban and rural representation. This Court, having familiarized itself with the previous record in this case, finds that plaintiffs, having failed before in convincing either the District Court or the Appellate Court that they are constitutionally entitled to a majority population in two beats, have done nothing more in their proposed plan in this trial than make the same contention again as reflected in their plan herein presented. As to this issue, this Court again points to the language of the Appellate Court:

> "Further, we reject the plaintiffs' notion that they are constitutionally entitled to have old District Four divided into two predominantly black electoral districts simply because they command a population concentration of sufficient size and contiguity to constitute two equally apportioned districts."

Aside from the plaintiffs' failure to file their plan, timely, the Court finds that it is a complete departure from the obvious intent of the District Court and Ap-

pellate Court that this trial be limited to whatever revisions might be necessary to defendants' 1970 plan, using 1970 Census figures. This Court finds that, under the laws of the State of Mississippi, boards of supervisors are charged primarily with the maintenance of roads and bridges and that traditionally funds for these purposes have been divided equally among the supervisors, each assuming the responsibility for his own beat. Under plaintiffs' plan, Beat 3 would have no territory, roads or bridges outside municipal limits or jurisdiction. The Court finds that the proposed uses by plaintiffs of enumerator district boundaries established by the Bureau of Census are not necessarily the proper nor legal descriptions required of a board of supervisors and which are readily identifiable from land deed records. The Court finds that plaintiffs have made no provision in their plan for the location of voting precincts in their proposed plan, nor provided a legal description of same. For all of the above reasons, and others as they may have appeared herein, the Court finds that plaintiffs' plan cannot be recommended for approval.

The Court admits it is not happy with defendants' 1971 proposed district boundaries within the northern part of the City that increase the negro majority in Beat 3, and lessen their population percentage in Beat 4, but under the time restrictions imposed on this Court, it has no recourse but to approve it.

As to the elections to be conducted according to the new beat and precinct boundaries, the Court finds that such an election as is authorized under Section 3296

of the Mississippi Code of 1942 should be held. The Court knows of no reason why this special election cannot be held in conjunction with the general Congressional elections in November 1972. Any and all candidates must, of course, qualify as provided under Section 3260 of the Mississippi Code.

On the basis of the above recited findings of fact and conclusions of law, this Court finds that defendants' revised, proposed plan should be approved. Although no Adams County election commission or commissioners are parties to this suit, the Court directs the board of supervisors, in cooperation with the election commissioners, to order a special election as herein provided, after first giving reasonable publicity thereto. As directed by the Fifth Circuit Court of Appeals in its order of July 29, 1971, the supervisors so elected shall assume and hold the offices to which they are elected within thirty days after such election.

An appropriate Order may be submitted.

/s/ DAN M. RUSSELL, JR.
UNITED STATES DISTRICT JUDGE

DATED: May 15, 1972

CORRECTION TO OPINION AND ASSESSMENT OF COSTS

United States District Court
Southern District of Mississippi
Western Division

Reverend Leon Howard, et al,
Plaintiffs

versus Civil Action No. 1352

Adams County Board of Supervisors, et al,
Defendants

It has been called to the attention of the Court that an error appears in the sentence comprising the first full paragraph of page 15 of the Court's opinion of May 15, 1972 in that where Beats 3 and 4 appear therein, these beats should have appeared in reverse order, based on the percentage figures appearing on pages 8 and 9 of the opinion, so that the sentence should read:

> "The Court admits it is not happy with defendants' 1971 proposed district boundaries within the northern part of the City that increase the negro majority in Beat 4, and lessen their population percentage in Beat 3, but under the, time restrictions imposed on this Court, it has no recourse but to approve it."

The Court also failed to assess costs in its opinion, and hereby directs that each party bear its own neces-

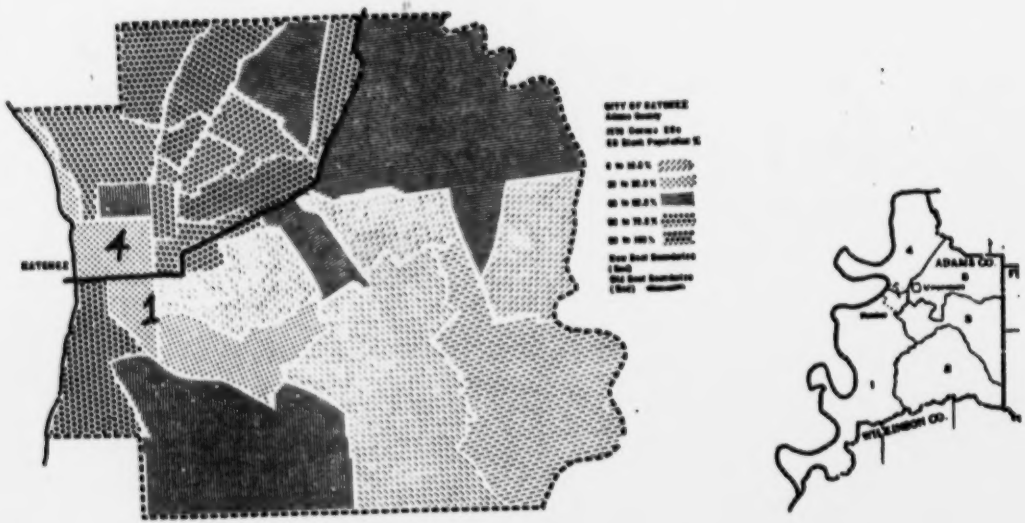
sary costs and expenses herein, with costs of court to be borne by the defendants exclusive of that portion of the costs of appeal heretofore assessed by the Fifth Circuit Court of Appeals to the plaintiffs.

The Court is entering its own order as of this date.

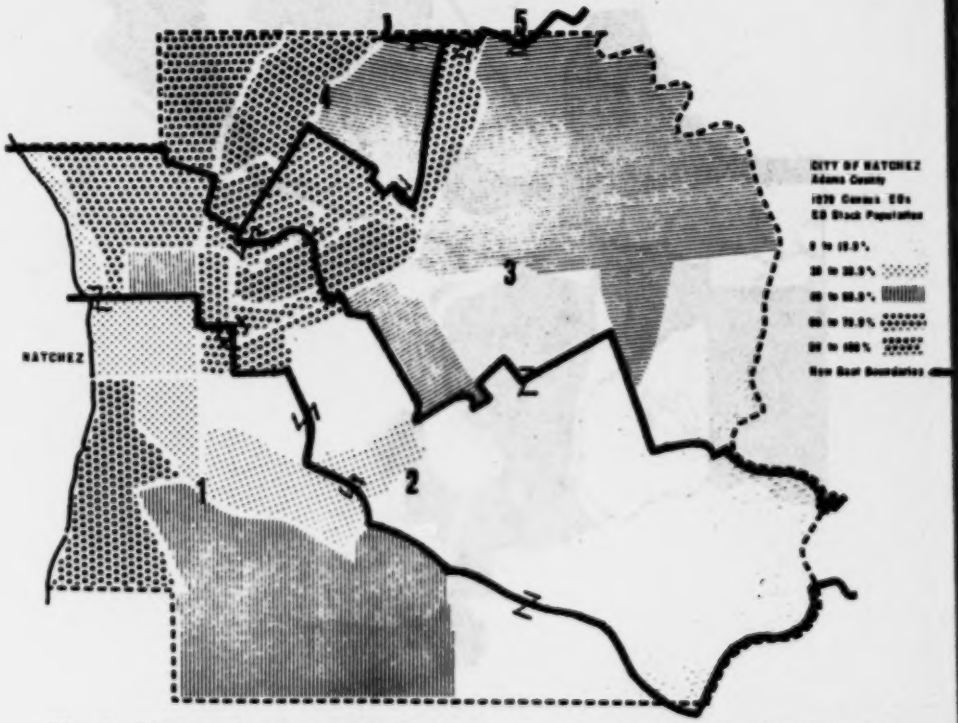
/s/ DAN M. RUSSELL, JR.
UNITED STATES DISTRICT JUDGE

DATED: June 2, 1972

APPENDIX B: MAPS SHOWING ADAMS COUNTY REDISTRICTING



Map 1. Map showing the boundaries of supervisors' districts (beats) within the City of Natchez (left) and Adams County (right) prior to redistricting, superimposed on 1970 Census enumeration districts shaded for racial percentage.



Map 2. Map showing the boundaries of the new supervisors' districts (beats) within the City of Natchez as established by the defendants' 1971 redistricting plan approved by the district court in its Opinion of May 15, 1972, superimposed on 1970 Census enumeration districts shaded for racial percentage. The "Z" marks indicate instances in which the new boundaries split up 1970 Census enumeration districts.

Map 3. Outline map of the boundaries of defendants' proposed supervisors' districts in the city and county showing overly elongated and uncompact districts containing many sides and converging on north Natchez.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-770

REV. LEON HOWARD and BARNEY SCHOBY,
Individually and on Behalf of All Others
Similarly Situated,
Petitioners,

vs.

ADAMS COUNTY BOARD OF SUPERVISORS, SAMUEL L. CAUTHEN, A. BOYD SOJOURNER, JAMES H. CARTER, IKE FOSTER and E. A. REDD, Members of the Adams County Board of Supervisors,
Respondents.

BRIEF OF RESPONDENT BOARD OF SUPERVISORS IN OPPOSITION TO PLAINTIFFS' PETITION FOR WRIT OF CERTIORARI

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In the Supreme Court of the United States

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Petitioners,

vs.

ADAMS COUNTY BOARD OF SUPERVISORS, SAMUEL L. CAUTHEN, A. BOYD SOJOURNER, JAMES H. CARTER, IKE FOSTER and E. A. REDD, Members of the Adams County Board of Supervisors,
Respondents.

BRIEF OF RESPONDENT BOARD OF SUPERVISORS IN OPPOSITION TO PLAINTIFFS' PETITION FOR WRIT OF CERTIORARI

The case now before this Court on Board of Supervisors' petition for writ of certiorari and petition for the writ filed by Plaintiffs below was first tried by the United States District Court for the Southern District of Mississippi in June, 1971. The opinion of the District Court is not reported but appears as Appendix 1 to Board of Supervisors' petition for writ of certiorari. The appearances of the case before the Court of Appeals prior to the second trial are Appendices 2, 3 and 4 to said petition. Appendix

4 is reported as *Howard* v. *Adams County Board of Supervisors,* 453 F.2d 455 (1972), cert. den. 407 U.S. 925, 32 L.Ed.2d 812, 92 S.Ct. 2461 (June 19, 1972).

The second trial of the case in May of 1972 was at the direction of the Court of Appeals to have been limited to the one issue of malapportionment. The District Court opinion is Appendix 5 to Board of Supervisors' brief on petition for the writ. The third and last opinion of the Court of Appeals appears as Appendix 6 to said brief and is reported in 480 F.2d 978.

All of the opinions are an integral part of this case and must receive this Court's attention in consideration of the questions presented. Each of the opinions will be referred to herein by the appendix number and page as each appears in brief of Board of Supervisors for writ of certiorari dated November 1, 1973, and filed and docketed in this Court as Cause No. 73-723.

The question presented by Plaintiffs' petition is whether Plaintiffs are entitled as a matter of constitutional right to have the population of Adams County distributed in such a manner that Plaintiffs are satisfied that blacks have a voting majority in at least two of the supervisor districts and whether this Court will entertain such a contention when the Plaintiffs' argument has been twice rejected by the United States District Court, twice rejected by the Court of Appeals for the Fifth Circuit and once rejected by this Court.

The one fact which emerges from the literally thousands of words which have been written about this litigation, spanning almost three years, two lengthy trials, three appeals to the Court of Appeals and one to this Court, is that Plaintiffs have reduced the questions in every instance to black versus white. Politically the notion is outdated in

Adams County. The District Court after the first trial held:

> "Since enactment of the Voting Rights Act in 1965 the registration and election officials of Adams County have denied no person the right to register to vote or the right to vote on account of race or color, and it has never been necessary to request the assistance of Federal Registrars and none have ever been sent into Adams County. The last re-registration in Adams County was conducted in 1956."

and the District Court concluded:

> "(5) the redistricting of Adams County was accomplished without the purpose or effect of overturning a Black majority in District 4 or in unconstitutionally diluting the Black vote in that district or in any other district, including District 4 or any other district of Adams County;"

Moreover, the results of recent elections, state, county and city, dispute the underlying premise that blacks are "frozen out" of the political process. In 1967 county elections no black offered for election to office of supervisor. One black ran for justice of the peace of District No. 4 and was elected. Four blacks offered for district constable. The candidate in District No. 4 was elected. The three other blacks running, one in District No. 1 and two in District No. 5, were all defeated.

The 1971 state and county elections saw the following results:

Judge Scott, the black justice of the peace from District No. 4, was re-elected without opposition. In District No. 4 a black candidate for constable defeated a white candidate. In the same district Leon Howard, one of the

Plaintiffs and a black, was defeated by the white incumbent supervisor. The other named Plaintiff, Barney Schoby, also a black, ran for the State Senate and carried District No. 4 and obtained a substantial vote in the remainder of the County.

It is interesting to note that in the 1971 state and county contested elections, of the seven (7) black candidates five (5) carried District No. 4 and two (2) did not.

Additionally, in June, 1972, the City of Natchez held its elections for mayor and aldermen in which candidates run on an at large basis. A black candidate for alderman, Ward 2, defeated the white incumbent for the same post. Whites were elected to the other five aldermanic offices.

It is an unsupported position to urge racial bloc voting in Adams County and to premise the argument of unconstitutional redistricting on the theory that given a black population majority, blacks by racial bloc voting will or even can elect a black. The whole argument is diametrically opposed to the fundamental premise that all redistricting must be accomplished with an "eye that is color blind."

The pre-1970 supervisor districts were grossly malapportioned ranging from a low in District No. 2 of 800 people to a high in District No. 4 of 16,832. Plaintiffs assert that the pre-1970 District No. 4 should be divided into two districts even though a redistricting plan which from a racial standpoint had the approval of the District Court, Court of Appeals and this Court, has intervened in point of time. The theory is in itself obvious racial gerrymandering.

The thrust of Plaintiffs' argument now is that blacks are entitled to have the district lines drawn so that blacks will have a majority of population in at least two districts

and seek to accomplish this purpose by dividing old District No. 4 into two new districts, each of which will have a substantial black majority. This was answered by the United States Supreme Court in *Conner* v. *Johnson*, 279 F.Supp. 619 (1966), affirmed per curiam 386 U.S. 483, 18 L.Ed.2d 224, 87 S.Ct. 1174:

> "It has thrice been held by three judge district courts, applying Wesberry, that one factor and only one, may be taken into account in apportioning and establishing Congressional districts among the people of a state and that factor is population. Calkins v. Hare, D.C., 228 F.Supp. 824; Meeks v. Anderson, D.C., 229 F.Supp. 271 at page 273, and Bush v. Martin, D.C., 224 F.Supp. 499 at page 511, affirmed, sub nom. Martin v. Bush, 376 U.S. 222, 84 S.Ct. 709, 11 L.Ed.2d 656 (1964)....
>
> "As to point 1, suggesting that the Congressional Districts should have been so arranged as to ensure the election of at least two Negro Members of Congress, we have only to point to the unanswerable logic of what Mr. Justice Douglas said (dissenting opinion) on this subject, in Wright v. Rockefeller, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512, reh. den. 376 U.S. 959, 84 S.Ct. 964, 11 L.Ed.2d 977." 279 F.Supp. at 623.

The logic of Mr. Justice Douglas is, as pointed out in *Conner*, truly unanswerable:

> "Racial electoral registers, like religious ones, have no place in a society that honors the Lincoln tradition—'of the people, by the people, for the people.' Here the individual is important, not his race, creed, or his color. The principle of equality is at war with the notion that District A must be represented by a Negro, as it is with the notion that District B must be repre-

sented by a Caucasian, District C by a Jew, District D by a Catholic, and so on. Cf. Gray v. Sanders, 372 U.S. 368, 379, 9 L.Ed.2d 821, 829, 83 S.Ct. 801. The racial electoral register system weighs votes along one racial line more heavily than it does other votes. That system, by whatever name it is called, is a divisive force in a community, emphasizing differences between candidates and voters that are irrelevant in the consitutional sense. Of course, race, like religion, plays an important role in the choices which individual voters make from among various candidates. But government has no business designing electoral districts along racial or religious lines." *Wright* v. *Rockefeller,* 376 U.S. 52, 66, 11 L.Ed.2d 512, 521, 84 S.Ct. 603 (1964)

and

"When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here." Supra, 376 U.S. at 67, 11 L.Ed.2d at 522.

This same contention advanced by the Plaintiffs at bar was also met and rejected in *Whitcomb* v. *Chavis,* employing, in part, this language:

"If this is the proper view of this case, the failure of the ghetto to have legislative seats in proportion to its population emerges more as a function of losing elections than a built-in bias against poor Negroes. The voting power of ghetto residents may have been 'can-

celed out' as the District Court held, but this seems a mere euphemism for political defeat at the polls.

"On the record before us plaintiffs' position comes to this: that although they have equal opportunity to participate in and influence the selection of candidates and legislators, and although the ghetto votes predominantly Democratic and that party slates candidates satisfactory to the ghetto, invidious discrimination nevertheless results when the ghetto, along with all other Democrats, suffers the disaster of losing too many elections. But typical American legislative elections are district-oriented, head-on races between candidates of two or more parties. As our system has it, one candidate wins, the others lose. Arguably the losing candidates' supporters are without representation since the men they voted for have been defeated; arguably they have been denied equal protection of the laws since they have no legislative voice of their own. This is true of both single-member and multi-member districts. But we have not yet deemed it a denial of equal protection to deny legislative seats to losing candidates, even in those so-called 'safe' districts where the same party wins year after year." *Whitcomb* v. *Chavis*, 403 U.S. 124, 153, 29 L.Ed.2d 363, 381, 91 S.Ct. 1858 (1971)

Surely, constitutional safeguards are for every citizen, not just black ones. The phrase "regardless of race" must have universal application. Plaintiffs at bar seek to have district lines drawn on the basis of race. Such lines are no less unconstitutional merely because they have the blessing of blacks. Recognition, if such is needed, is given to this suggestion by the Court in footnote 34 in the opinion in *Whitcomb* v. *Chavis*:

"Interestingly enough, in Wright v. Rockefeller, 376 U.S. 52 (1964), challenge was to a single-member district plan with districts allegedly drawn on racial lines and designed to limit Negroes to voting for their own candidates in safe Negro districts. We rejected the challenge for failure of proof, but noted in passing that'. . . some of these voters . . . would prefer more even distribution of minority groups among the four congressional districts, but others, like the intervenors in this case, would argue strenuously that the kind of districts for which appellants contended would be undesirable and, because based on race or place of origin, would themselves be unconstitutional.' 376 U.S at 57-58." Supra, 403 U.S. at 156, 29 L.Ed.2d at 363.

Furthermore, the Court of Appeals has particularly addressed itself to the contention that old District No. 4 should be divided into two new districts in saying:

"Further, we reject the plaintiffs' notion that they are constitutionally entitled to have old District Four divided into two predominantly black electoral districts simply because they command a population concentration of sufficient size and contiguity to constitute two equally apportioned districts. This rationale was rejected by Justice White for the majority in Whitcomb, saying that such a contention

'. . . (is) expressive of the more general proposition that any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat and represents a majority living in an area sufficiently compact to constitute a single-member district. This approach would make it difficult to reject claims of Democrats, Republicans, or members of any political organization . . . who live in what would be safe dis-

> tricts in a single member district system but who ... are submerged in a one-sided ... vote.
>
> '... (It) is not at all clear that the remedy is a single-member district system with its lines carefully drawn to ensure representation to sizable racial, ethnic, economic, or religious groups and with its own capacity for overrepresenting and underrepresenting parties and interests . . .'" 403 U.S. at 156, 160.
>
> *Howard* v. *Adams County Board of Supervisors,* 453 F.2d 455, at 458.

And on the second trial of this case the District Court concluded:

> "This Court, having familiarized itself with the previous record in this case, finds that plaintiffs, having failed before in convincing either the District Court or the Appellate Court that they are constitutionally entitled to a majority population in two beats, have done nothing more in their proposed plan in this trial than make the same contention again as reflected in their plan herein presented." (A. 65)

On the last appeal to the Court of Appeals the Court concluded:

> "There is nothing new in the racial dilution arguments contained in this appeal. We are consequently bound by and adhere to the prior panel decision on that subject." (A. 73)

Plaintiffs' arguments presently being considered by the Court on petition for writ of certiorari are neither new to this case nor are they new to this Court. At page 7 of Plaintiffs' brief counsel capsules their argument:

"Instead of simply subdividing old District 4 into two new districts equal in population, both of which would have contained black majorities, the all-white Board of Supervisors approved a plan which carved up old District 4 among all five of the new districts, fragmenting areas of heavy black population concentration among the new districts, and thereby minimizing the number of black voters residing in each of the new districts (except one) and diluting black voting strength in Adams County."

In Plaintiffs' petition for writ of certiorari filed in this Court as Docket No. 71-1406, precisely the same position rests at the heart of Plaintiffs' objection to the Board of Supervisors' redistricting plans:

"1. Whether manipulation of election district boundaries on the basis of race by abandoning pre-existing district lines and crossing neighborhood boundaries to disperse a heavily black population concentration (here, old District Four) among four new election districts and thereby maximizing the number of white majority districts and minimizing the number of black majority districts constitutes unconstitutional and unlawful racial gerrymandering." (p. 2)

and

"Although blacks previously had a majority in only one district, District Four, their population was sufficiently large that, in the language of the reapportionment cases, District Four voters were 'constitutionally entitled' to two supervisors, not one. The redistricting plan, which dispersed this second black majority among three new white majority districts, thus robbed those black voters of the opportunity to elect a second black supervisor which they would have had if

> the redistricting had been accomplished on a fair and non-racial basis—by dividing old District Four in half, providing for two black majority districts." (p. 26)

Turning to Plaintiffs' brief, Defendants are constrained to dispute several assertions as either unwarranted conclusions or simply misstatements.

ONE. In the first few lines of Plaintiffs' brief there appears a reference to the black voting majority in Supervisor District Four. The reference is to old District Four, that is, the pre-1970 District Four. It is a matter of record and the Court of Appeals in its last opinion held that:

> "Further pursuing the subject of dilution of the racial voting power, neither the plaintiffs nor the defendants have provided us with data as to voting strength in the various proposed districts now under review."

Plaintiffs' effort at transforming a population majority to a voting majority is at best an assumption which the Court of Appeals has held to have no basis in the record. Furthermore the Plaintiff Schoby admitted on the first trial a great deal of difficulty in getting blacks to register to vote. The point is simply that every court that has heard this case has found that the redistricting efforts of the Defendants have been free of racial overtones and that there has been no voter discrimination in Adams County since 1965. Nonetheless Plaintiffs attempt to inject voter discrimination into the case where the record is bare of any evidence of it. The insidious effort is to conclude a history of racial voter discrimination even though Plaintiffs have wholly failed in their burden of proof of it.

In order to lend a touch of accuracy to the conclusion of "history of racial discrimination" Plaintiffs make the flat assertion that:

> "The switch to at-large elections, which diluted black Adams County voting strength in District 4, was struck down in 1969 as racially discriminatory."

The fact is that this Court held:

> "The discriminatory purpose or effect of the statutes, if any, has not been determined by any Court." *Allen et al.* v. *State Board of Elections*, 393 U.S. 544, 22 L.Ed.2d 1 (1969)

Moreover, the Court said that Section 5 (of the Voting Rights Act of 1965) coverage questions involve "issues subject to rational disagreement" and were not "so clearly subject to Section 5 that the Appellees' failure to submit them for approval constituted deliberate defiance of the Act." 393 U.S. 544 at 572.

The conclusion is inescapable that Adams County has for many years been one of the most progressive in our country. While communities all over the nation were demanding federal registrars to assure that citizens offering to register to vote were not in any manner impeded, no request for registrars was ever made for Adams County. (A. 21) Even prior to the 1965 Voting Rights Act blacks were registered to vote in Adams County when in other areas of the state and country they did not even attempt it. The assertion that Adams County has a "long history of voter discrimination" is not accurate.

TWO. It is true that in the compilation of the 1970 redistricting plan none of the five incumbent supervisors were displaced from their respective districts. However, two important factors contributed to this. First, all five

lived outside of the city limits and of course within the boundaries of the pre-1970 district lines. Since each of the 1970 districts were in the same geographical areas as their pre-1970 counterparts, it resulted that each supervisor remained in his district.

It is also a fact that the state law, *Mississippi Code Annotated,* Section 2870 (1942), now *Mississippi Code Annotated,* Section 19-3-1 (1972) after recodification, provides that redistricting must be accomplished by a unanimous vote of the supervisors. See *Fairley* v. *Patterson,* dec. sub nom. *Allen* v. *Board of Elections,* 393 U.S. 544, 22 L.Ed.2d 1, 89 S.Ct. 817 (1969). Obviously unanimous approval of the members of the board would be difficult if not impossible to obtain if two or more incumbents had been pitted against each other. In any case, the representative of the professional firm employed to accomplish the redistricting testified that he had taken it upon himself to create districts which did not displace a supervisor; that no instruction to that effect came from any supervisor but this was based on his experience with other redistricting plans. (Second Trial R. 213)

The second redistricting plan (December 1, 1971) also left all supervisors in their respective districts but only because they all lived outside the limits of the City of Natchez and in revising and modifying the 1970 plan as ordered by the Court of Appeals Comprehensive Planners shifted district lines within the city limits only, conceiving that the larger the population concentration the fewer enumeration districts to be split by new district lines in equalizing population and the shorter the segments of lines to be relocated.

Plaintiffs attempt to use *Gaffney* v. *Cummings,* ..... U.S. ....., 37 L.Ed.2d 298, 93 S.Ct. ..... (1973), as authority for their position that the redistricting plan before the

Court has blacks "fenced out of the political process and their voting strength invidiously minimized" because the white incumbents were left in their respective districts by the plan. In response, first look to the makeup of the districts as compared to the countywide black and white percentages of population. Countywide blacks account for 48.1% of the total population and whites 51.9%. By district the 1971 plan reflects the following percentages:

	Black	White
District No. 1	45.6%	54.4%
District No. 2	40.7%	59.3%
District No. 3	42.3%	57.7%
District No. 4	77.6%	22.4%
District No. 5	34.1%	65.9%
Total countywide	48.1%	51.9%

While it is undisputed throughout all of the volumes of testimony from the first and second trials of this case that the racial composition of the new districts were unknown until some time after compilation of the plan before the Court, even to Comprehensive Planners (A. 60), the plan did result in black and white percentages of population which "within tolerable limits" compare favorably with the county percentages of black and white. The population ratios in Districts No. 1, 2 and 3 closely approximate the countywide percentage difference. Blacks heavily preponderate over whites in District No. 4 while whites have a heavy majority of population in District No. 5.

So far from being supporting authority *Gaffney* v. *Cummings*, supra, concludes:

> "But neither we nor the district courts have a constitutional warrant to invalidate a state plan, otherwise

within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State."

THREE. Plaintiffs' plan was first submitted for consideration in May, 1972, just three days before the second trial of the case and more than two years after the initial efforts of Defendants at redistricting. No other plan has ever been suggested by Plaintiffs. At the conclusion of the second trial Plaintiffs' plan was rejected:

"This Court, having familiarized itself with the previous record in this case, finds that plaintiffs, having failed before in convincing either the District Court or the Appellate Court that they are constitutionally entitled to a majority population in two beats, have done nothing more in their proposed plan in this trial than make the same contention again as reflected in their plan herein presented. As to this issue, this Court again points to the language of the Appellate Court:

'Further, we reject the plaintiffs motion that they are constitutionally entitled to have old District Four divided into two predominantly black electoral districts simply because they command a population concentration of sufficient size and contiguity to constitute two equally apportioned districts.'

Aside from the plaintiffs' failure to file their plan, timely, the Court finds that it is a complete departure from the obvious intent of the District Court and Appellate Court that this trial be limited to whatever revisions might be necessary to defendants' 1970 plan,

> using 1970 Census figures. This Court finds that, under the laws of the State of Mississippi, boards of supervisors are charged primarily with the maintenance of roads and bridges and that traditionally funds for these purposes have been divided equally among the supervisors, each assuming the responsibility for his own beat. Under plaintiffs' plan, Beat 3 would have no territory, roads or bridges outside municipal limits or jurisdiction. The Court finds that the proposed uses by plaintiffs of enumerator district boundaries established by the Bureau of Census are not necessarily the proper nor legal descriptions required of a board of supervisors and which are readily identifiable from land deed records. The Court finds that plaintiffs have made no provision in their plan for the location of voting precincts in their proposed plan, nor provided a legal description of same. For all of the above reasons, and others as they may have appeared herein, the Court finds that plaintiffs' plan cannot be recommended for approval." (A. 65-66)

And the Court of Appeals affirmed, saying:

> "There is nothing new in the racial dilution arguments contained in this appeal. We are consequently bound by and adhere to the prior panel decision on that subject." (A. 73)

The United States Attorney General, two district courts, the Court of Appeals, two different panels sitting, and this Court on petition for writ of certiorari in Cause No. 71-1406 have all rejected Plaintiffs' argument. Surely the contention has been long since laid to final rest.

As almost every court in the United States, both state and federal, have many times written, in applying the doctrine of res adjudicata, stare decisis, law of the case, estop-

pel by judgment and similar principles of law, "there must some day be an end to litigation."

Defendants respectfully urge that the Plaintiffs' petition for writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE

I hereby certify that I have served three (3) printed copies of the foregoing Brief of Respondent Board of Supervisors in Opposition to Plaintiffs' Petition for Writ of Certiorari upon George Peach Taylor, attorney for the Petitioners, they being all parties required to be served, by depositing said copies in the United States mail, first class air mail postage prepaid, in an envelope addressed to said attorney at Box 1435, University of Alabama, Tuscaloosa, Alabama 35486.

This 11th day of February, 1974.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-770

REV. LEON HOWARD and BARNEY SCHOBY, individually and on behalf of all others similarly situated,
Petitioners,

versus

ADAMS COUNTY BOARD OF SUPERVISORS; SAMUEL L. CAUTHEN, A. BOYD SOJOURNER, JAMES H. CARTER, IKE FOSTER, and E. A. REDD, Members of the Adams County Board of Supervisors,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

Respondents' Brief in Opposition was not filed or served until long after the deadline imposed by Rule 24(1) of the Rules of this Court had passed. This Petition was docketed on November 13, 1973. Respondents' Brief in Opposition was due on or before December 13, 1973. Respondents had received copies of the Petition before it was docketed, but did not serve copies of their Brief in Opposition upon counsel for petitioners until February 14, 1974, more than two months after

it was due, no extension of time having been requested or granted.

Nevertheless, petitioners file herewith their response to the Brief in Opposition.

A. RESPONDENTS MIS-STATE THE QUESTION PRESENTED.

Respondents in their Brief in Opposition attempt to convert petitioners' anti-gerrymander and anti-dilution argument into a claim for proportional representation. They contend that the question presented is whether plaintiffs are constitutionally entitled to two black majority districts as a matter of right; whether Adams County blacks are entitled to have the new district lines carefully drawn so that blacks will have a majority of population in two districts (Brief for Respondents, pp. 2, 4).

This seriously mis-states the question presented and warps and distorts the anti-gerrymander and anti-dilution argument. While some form of remedial and benign districting may ultimately be required in some cases to overcome the past effects of racial discrimination in voting and districting, cf. *Taylor* v. *McKeithen*, 407 U.S. 191, 193 (1972), we believe the Court does not have to decide that issue to grant plaintiffs the relief which they request in this case. The facts of this case show that the defendants consciously and intentionally approved a redistricting plan which carves up and fragments a readily identifiable black population concentration — sufficiently large to make up a separate supervisors' district — among four white

majority districts, thus submerging and cancelling out black voting strength.

That the Constitution protects the franchise of black voters against racial gerrymandering which dilutes black voting strength, particularly after a long history of racial discrimination affecting voting, is firmly established in our jurisprudence. *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); *Sims* v. *Baggett*, 247 F. Supp. 96 (M.D. Ala. 1965); *Bussie* v. *Governor of Louisiana*, 333 F. Supp. 452 (E.D. La. 1971), *modified*, 457 F.2d 796 (5th Cir. 1971), *vacated and remanded sub nom Taylor* v. *McKeithen*, supra. Last term this Court unanimously affirmed a District Court decision voiding multimember districts in Texas on the basis of the conclusion that such districts "are unconstitutional in that they dilute the votes of racial minorities." *Graves* v. *Barnes*, 343 F. Supp. 704, 735 (W.D. Tex. 1972), *aff'd in relevant part, White* v. *Regester*, 412 U.S. 755 (1973). The only difference is that here the dilution of minority voting strength is effectuated, not by at-large elections or multi-member districts, but by the racially discriminatory drawing of district lines which accomplishes the same result.

B. THE QUESTION OF INJURY: THE RULE OF ABSOLUTE EQUALITY IS PERFECTLY COMPATIBLE WITH GERRYMANDERING OF THE WORST SORT UNLESS THIS COURT ESTABLISHES STRICT RESTRAINTS ON RACIAL GERRYMANDERING.

Perhaps the greatest difficulty the courts below have had in conceptualizing the issues presented in this case

has been in pin-pointing the harm or injury suffered by Adams County black voters as a result of this redistricting plan. The respondents argue in their Brief in Opposition that the redistricting plan (like their at-large election scheme voided when the United States Attorney General objected to the 1966 amendment to Miss. Code § 2870) evenly distributes the black population of the county among the districts in close proportion to their percentage in the over-all county population (Brief, p. 14). In its prior opinion the Court of Appeals in approving the prior redistricting plan noted this racial "balance" and further noted that blacks continued to command a black majority in District 4 (453 F.2d at 458).

The question arises: Has the application of the rule of strict equality of population in Adams County, Mississippi, enhanced the opportunities of the constitutionally protected minority to fair and effective participation in the political processes, or has it simply made racial gerrymandering easier?

Prior to redistricting in 1970 (the first redistricting plan), white voters in Adams County, which is 47.9 percent black, enjoyed a disproportionate 4-1 supervisors' district advantage over blacks because the five districts were malapportioned in violation of *Reynolds* v. *Sims*, 377 U.S. 533 (1964). The voting strength of Adams County's black voters was debased and diluted because the black population was concentrated in District 4 (the only black majority district), which contained 15,074 persons (1970 Census), twice the size of an equally apportioned district (norm, 7,459 per-

sons). Thus, by reapportionment standards, the population of District 4 (75.3 percent black) was severely under-represented, and this malapportionment severely diluted the voting strength of blacks and unlawfully maximized the number of white majority districts.

By carefully redrawing the new districts (the second redistricting plan, at issue here) to preserve white incumbent supervisors in their respective districts and to fragment and disperse the black population concentration in old District 4 among all five of the new districts, the defendants have thwarted the constitutionally protected rights of Adams County blacks to "fair and effective participation in the political processes," *Reynolds*, supra, 377 U.S. at 565, to the same extent that malapportionment thwarted those rights prior to 1970. Thus, although the new districts are substantially equal in population (although not as equal as plaintiffs' proposed districts with a span of only 1.79 percent as opposed to 2.87 percent in defendants' plan), Adams County blacks — with almost half the population — have their voting strength debased and diluted once again.

This time the mechanism for dilution is racial gerrymandering of district lines rather than malapportionment, and after extensive litigation to gain equi-populous districts blacks are relegated once again to a voting majority in only one district and whites once again preserve their disproportionate 4-1 advantage. For Adams County blacks, nothing has changed. What, then, is the value of the standards of strict arithmetic equality imposed by the reapportionment decisions of

this Court if, in achieving equi-populous districts, Southern officials are permitted to protect white incumbents, abandon pre-existing political and natural geographic boundaries, Census units, and compact districts, and through racial gerrymandering totally frustrate the popular will and maximize the political advantage of the whites in power and minimize the voice of repressed blacks struggling for an equal voice in county government?

Members of this Court, dissenting in some of the reapportionment cases, have recognized this danger. Mr. Justice Harlan, joined by Mr. Justice Stewart, dissenting in *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969), and *Wells* v. *Rockefeller*, 394 U.S. 542 (1969), pointed out:

> "The fact of the matter is that the rule of absolute equality is perfectly compatible with 'gerrymandering' of the worst sort. A computer may grind out district lines which can totally frustrate the popular will on an overwhelming number of critical issues. The legislature ... must create a structure which will in fact as well as theory be responsive to the sentiments of the community ... If the Court believes it has struck a blow today for fully responsive representative democracy, it is sorely mistaken. Even more than in the past, district lines are likely to be drawn to maximize the political advantage of the party temporarily dominant in public affairs." 394 U.S. at 551, 552.

Similarly, Mr. Justice White in his dissent wrote:

> "Today's decisions on the one hand require precise adherence to admittedly inexact census figures, and on the other downgrade a restraint on a far greater potential threat to equality of representation, the gerrymander. Legislatures intent on minimizing the representation of selected political or racial groups are invited to ignore political boundaries and compact districts so long as they adhere to population equality..." 394 U.S. at 555.

This is not to say that the salutary gains achieved by requiring substantial equality of population must be discarded. Rather, the Court is petitioned to establish strict anti-gerrymandering standards pursuant to the Constitutional prohibitions against racial discrimination and abridgment of black voting strength to prevent racial gerrymandering within the population equality requirement.

The unconstitutionality of defendants' plan is perhaps most strikingly illustrated by the theoretical discussion in G. Tyler and D. Wells, *The New Gerrymander Threat*, 78 The American Federationist (No. 2) (Feb. 1971). Noting that "the 1970's may well turn out to be the decade of the great gerrymander," (p. 1), the authors show conclusively how popular voting strength may be frustrated and thwarted in a hypothetical state (closely resembling

Adams county conditions) that is entitled to four elected representatives (here, five), and has a city (like Natchez, aligned on the state's/county's boundary) which contains half of the state's population. This state is evenly divided in population (50-50) between two political parties (races), Party X (blacks) and Party Y (whites). Adherents of Party X are most heavily concentrated in the city (here, north Natchez and old District 4, 75.3% black), which prior to redistricting was included entirely with a single malapportioned district. The majority of the members of Party Y (whites) are spread throughout the rural area outside the urban center.

The first ilustration closely resembles Adams County prior to redistricting in 1970. Party Y enjoys a disproportionate 3-1 advantage over Party X as a result of, and because of, malapportionment. Party X members (blacks here) are concentrated by gerrymandered boundary lines into District 1 (here District 4), which in the illustration contains half the state's population, thus maximizing the number of "safe" seats held by Party Y.

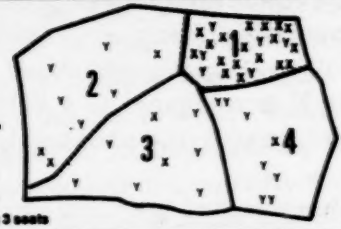
The second illustration shows exactly what happened in Adams County. The one-person, one-vote requirement is applied to provide districts precisely equal in population, but Party Y (presumably in charge of redistricting) can perpetuate its discrimination against Party X and maintain its disproportionate 3-1 advantage by carefully redrawing the district lines so that the Party X concentration in the city, formerly in a single district (blacks in north Natchez), is fragment-

Gerrymandering Comes in Many Shapes...

With Unequal Districts...

District 1 — Population: 1,000,000; Party "X" wins by 3-1 margin
District 2 — Population: 333,334; Party "Y" wins by 5-3 margin
District 3 — Population: 333,333; Party "Y" wins by 3-1 margin
District 4 — Population: 333,333; Party "Y" wins by 7-1 margin

☐ Party "X" wins 1 seat; ☐ Party "Y" wins 3 seats



(Each District Has 500,000 Population)

District 1 — Party "X" wins by 3-1 margin
District 2 — Party "Y" wins by 3-1 margin
District 3 — Party "Y" wins by 7-5 margin
District 4 — Party "Y" wins by 7-5 margin

☐ Party "X" wins 1 seat;
☐ Party "Y" wins 3 seats

With Equal Districts.

(Each District Has 500,000 Population)

District 1 — Party "X" wins by 7-5 margin
District 2 — Party "X" wins by 2-1 margin
District 3 — Party "X" wins by 7-5 margin
District 4 — Party "Y" wins by 5-1 margin

☐ Party "X" wins 3 seats;
☐ Party "Y" wins 1 seat

But Apportionment Can Be Equitable.

(Each District Has 500,000 Population)

District 1 — Party "X" wins by 3-1 margin
District 2 — Party "X" wins by 3-1 margin
District 3 — Party "Y" wins by 2-1 margin
District 4 — Party "Y" wins by 5-1 margin

☐ Party "X" wins 2 seats; ☐ Party "Y" wins 2 seats

ed and dispersed among three overly elongated and uncompact "safe" Party Y majority districts. In three of the four new, equi-populous districts Party Y retains decisive majorities. Thus, although reapportionment requirements have provided four districts equal in population, Party X — with half the voters — has its voting strength minimized and diluted once again. Party X is relegated to a voting majority in only one district, exactly the situation prior to reapportionment.

Using this, and the third example, in which the tables are turned and Party X gains a 3-1 advantage, the authors conclude:

> "The way the districts are divided can make the difference between one party or the other winning a 3-1 advantage. And this can be done just as easily when the districts have equal population as when they are unequal." (p. 2)

The fourth illustration, with the caption "But Apportionment Can Be Equitable," closely resembles the plaintiffs' proposed alternative redistricting here. The four legislative seats are equitably apportioned to each party according to its voting strength in the population. The city is split between two compact districts (each of which has a Party X majority), and the rural area is likewise divided between two compact districts with Party Y majorities.

Tyler and Wells, who are serious students of the American plitical scene and whose exposes of the inequities of malapportionment contributed to the *Reynolds*

decision, then show how fairness in redistricting can be achieved without the necessity of adopting a rule of proportional representation. "A fair plan is one not drawn with a view towards partisan or individual advantage" (p. 7). They propose a series of "districting rules" intended to minimize partisan advantage and to contribute to "equitable" districting, which the Court could well apply to this case. Apart from the traditional anti-gerrymandering considerations, such as contiguity and a 2 percent population equality standard, they also suggest that divisions of cities and towns should be minimized, and "the aggregate length of all boundary lines shall be as short as possible," (p. 7), standards satisfied by the plaintiffs' proposed plan but obviously violated by the defendants' plan.

C. PAST HISTORY OF RACIAL DISCRIMINATION AFFECTING VOTING IN ADAMS COUNTY.

The respondents make a serious effort to mislead this Court as to the nature of this case by portraying Adams County, Mississippi, as a veritable racial utopian where blacks and whites have lived together in complete and blissful racial harmony, even prior to the passage of the Voting Rights Act of 1965 (Brief in Opposition, p. 12). Since it is important to the determination of whether the redistricting plan at issue perpetuates a past pattern of denying to blacks equal access to the political process, we note that the respondents omit to inform the Court that this Record, and matters subject to judicial notice, contain evidence that:

1. At least until 1952, the Rules of the Mississippi Democratic Committee excluded blacks from participation in the Democratic primaries of the state. P. Lewinson, RACE, CLASS, AND PARTY, Appendix III (1932); D. Weeks, "The White Primary," 8 Miss. L.J. 135, 138-39 (1935).

2. At least until 1965, and possibly thereafter, the public schools of Natchez and Adams County were segregated on the basis of race, and a dual, bi-racial school system was maintained. *United States* v. *Natchez Sp. Mun. Sep. School Dist.*, Civil No. 1120 (S.D. Miss. filed Sept. 7, 1965).

3. The District Court in this case determined that "Prior to the passage of the Voting Rights Act of 1965, qualified Black voters in Adams County, Mississippi, were substantially disfranchised" (Opinion of July 20, 1971, pp. 19-20), obviously by the racially discriminatory voter registration tests and procedures abolished by that Act. See *United States* v. *Mississippi*, 380 U.S. 128 (1965).

4. In 1965 George Metcalf, then president of the Adams County branch of the NAACP and active in voter registration, was seriously injured when a bomb placed in his car exploded. 1971 Hearing Tr., pp. 82-83.

5. In 1966 Whorlis Jackson, then treasurer of the NAACP county branch and active in voter registration, was killed by a bomb in his car, and his murderers were never found or convicted. 1971 Hearing Tr., pp. 80-82.

6. In October, 1965, Natchez city officials arrested approximately 700 civil rights demonstrators under an unconstitutional parade ordinance, unlawfully denied them their right to be taken before a magistrate for a hearing on probable cause and bail, and transported more than 150 of the demonstrators by bus over 200 miles to the Mississippi State Penitentiary at Parchman where they were unlawfully subjected to "sub-human treatment which beggars justification and taxes credulity." At Parchman they were "processed" by being forced to strip naked, take cold showers, and drink laxatives. Many were beaten, and denied medical treatment. Several days later they were discharged and told to get home on their own. *Anderson* v. *Nosser*, 438 F.2d 183, 186 (5th Cir. 1971), modified and aff'd en banc, 456 F.2d 835 (1972), cert. denied, 409 U.S. 848 (1972).

7. In 1966 the all-white Adams County Board of Supervisors switched from district to county-wide supervisor elections pursuant

> to the 1966 amendment to Miss. Code § 2870 (1956 Recomp.), with the inescapable effect of diluting black voting strength in District 4 and preventing the election of a black supervisor from that district. In 1969 the United States Attorney General, with notice of the Adams County facts, ruled that the 1966 amendment to Miss. Code § 2870, along with two other amendments to the state's election laws, "had as their purpose and have had as their effect the denial and the abridgment of the right to vote on account of race or color." Complaint, Ex. D.

These facts completely refute respondents' contention that: "The conclusion is inescapable that Adams County has for many years been one of the most progressive in our country. * * * The assertion that Adams County has a 'long history of voter discrimination' is not accurate" (Brief for Respondents, p. 12).

Respondents' references in their Brief (pp. 3, 4) to the election returns, some of which are not even in the Record, prove rather than refute petitioners' contentions that racial bloc voting prevails and that blacks have been "frozen out" of the political processes. No black candidates for county office in Adams County have ever been elected from a white majority district. As respondents point out, the only black candidates who were successful in the 1967 elections were from District 4; candidates in Districts 1 and 5 were soundly defeated. In the 1971 county elections again, the only

district carried by black candidates was District 4. Although one black candidate won election to the Natchez city council in the 1972 municipal elections (not in the Record) (Brief in Opposition, p. 4), showing substantial black voting strength in Natchez, under the defendants' redistricting plan Natchez is fragmented and dispersed among all five proposed districts, thus admitting our point that the redistricting substantially cancels out Natchez black voting strength.

D. THIS CASE IS NOW RIPE FOR FINAL REVIEW IN THIS COURT.

Respondents finally contend that the prior adjudication in this case, and the prior denial of certiorari by this Court, should be a sufficient basis for denial of certiorari here (Brief for Respondents, pp. 16-17). But review of the prior decisions would have been premature and untimely, since the defendants had not yet filed with the District Court a plan providing for districts substantially equal in population, and plaintiffs had not yet filed their alternative redistricting plan. Indeed, this was the basis on which respondents opposed our Petition for a Writ of Certiorari in the prior case (Brief in Opposition, p.1, *Howard* v. *Adams County Bd. of Supervisors,* No. 71-1406). Having opposed our prior Petition on the grounds that the appeal was premature and constituted a piecemeal appeal not decisive of the primary issues involved, respondents should be estopped from arguing (now that all the issues presented in this case are ripe for final adjudication by this Court) that petitioners should be foreclosed from seeking review in this Court of the important

issues presented because of the results of the prior, and incomplete, adjudication. All of the issues presented in this case have now been adjudicated by the courts below, and this case is now final and ripe for final review by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have this day mailed, postage prepaid, three copies of the foregoing Petitioners' Reply Memorandum to the following counsel:

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This the ____ day of March, 1974.

_____